BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TORRIE BATES Claimant	)	
VS.	)	
GOODYEAR TIRE & RUBBER CO. Respondent	)	Docket No. 1,033,885
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 30, 2007 Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) granted the claimant's request for medical treatment with Dr. Vosburgh until further order after finding the claimant suffered a series of accidental injuries to his shoulder arising out of and in the course of employment with the respondent. The ALJ also found that timely notice was given, and that the date of accident would be March 15, 2007, the day that written diagnosis was made.[1]

The respondent requests review of several underlying compensability issues, although its brief only addresses whether timely notice was given.[2] Succinctly put, respondent argues that claimant alleges he suffered an accident on February 12, 2007, yet told no one of his injury until March 28, 2007. And because more than 10 days passed between the accident and notice, the ALJ erred in granting claimant's request for benefits.

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[1] ALJ Order (May 30, 2007).

[2] Respondent also listed as an issue whether claimant's alleged injury arose out of and in the course of his employment. But there is no argument advanced in either the preliminary hearing transcript or the briefs to the Board on this issue. Nor is there any medical evidence to suggest that claimant's torn rotator cuff occurred in any other fashion than while he was at work on February 12, 2007 and thereafter.

Claimant argues that the Order should be affirmed in all respects. Claimant maintains that he sustained an injury to his shoulder on February 12, 2007, but he continued to work thereafter, further injuring the shoulder. And under the applicable version of K.S.A. 44-508(d), he provided notice in a timely fashion, once his condition was diagnosed by Dr. Vosburgh. And even if February 12, 2007 was the appropriate accident date for a non-repetitive injury, claimant contends he established just cause for providing notice after the initial 10 day period as permitted by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds the ALJ's Order for Medical Treatment should be affirmed.

Claimant is seeking medical treatment for an alleged series of accidents beginning on February 12, 2007 to March 15, 2007, the date he was diagnosed with a torn rotator cuff. On February 12, 2007, the claimant stated that while working he suffered an injury to his shoulder while picking up a roll of rubber for a tire tread. Claimant remembers feeling a pinching or a pop in his left shoulder and after a short period, he took a break because he was feeling numbness in his hand. After the break he went back to work and continued to work the rest of the week. Claimant stated that he did not report his injury right away as he thought the pain would subside.

Claimant continued to work his regular duties but he testified that the longer he worked the more pain he began to have in his shoulder. In late February he contacted Dr. Vosburgh, a physician who was treating him for an unrelated physical problem.

On March 8, 2007,[3] Dr. Vosburgh examined claimant and ordered an x-ray. The office notes indicate claimant related his shoulder pain to an event pulling rubber at work a few weeks earlier with ongoing and worsening complaints. According to the claimant, when he left work for this appointment, he told them "what I went to see a doctor for."[4] And in order to return to work following that appointment, he testified that he tendered Dr. Vosburgh's paperwork to the dispensary.

On March 12, 2007, the claimant had an MRI of the shoulder taken, which revealed a torn rotator cuff.[5] Dr. Vosburgh then gave the claimant a note to give to the respondent, which reflected his diagnosis and was tendered to respondent's dispensary. At that point the claimant was seen by the company physician, Dr. Myron Zeller, who in turn authorized Dr. Vosburgh to continue to treat claimant.

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[3] Dr. Vosburgh's records indicate this visit occurred on March 5, 2007.

[4] P.H. Trans. at 8-9.

[5] *Id.* at 9-10.

The ALJ concluded that claimant's accidental injury arose out of and in the course of his employment with respondent and that the notice he provided was timely, based on a diagnosis of his injury on March 15, 2007. The ALJ's Order suggests that he viewed the claimant's injury as one that involved a series of repetitive injuries, thus implicating the recently enacted version of K.S.A. 44-508(d), which provides as follows:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

And the ALJ concluded that the report issued to claimant and tendered to respondent reflecting his diagnosis satisfied the statutory requirement and established a statutorily-determined date of accident of March 15, 2007.

The gist of respondent's argument in this appeal, that claimant failed to notify it of his acute accidental injury on February 12, 2007 within 10 days, fails to acknowledge the entirety of claimant's testimony and the implications of the new statute. Claimant testified that he felt a pinch or a pop on February 12, 2007. He went on to testify that he thought it would get better. Unfortunately, his symptoms did not abate. Claimant sought out an evaluation and diagnosis, continuing all the while to work his normal work duties. Each time claimant saw the physician, Dr. Vosburgh, he would tender his paperwork to his employer. The first office note referenced "pulling rubber", one of claimant's normal work activities. Then, when he was diagnosed on March 15, 2007, he again gave that paperwork to respondent. This paperwork included a diagnosis of a torn rotator cuff. And respondent's own in-house physician designated Dr. Vosburgh as the treating physician.

Under these facts, this Board Member finds the ALJ's conclusion as to the repetitive nature of claimant's injury are justified. While it is true that claimant may have had an acute injury on February 12, 2007, he continued to work his regular duties, performing activities that would aggravate such an injury. Indeed, there is no indication in this record that anything other than work caused his shoulder complaints. Thus, the finding that claimant sustained a series of repetitive injuries to his shoulder is affirmed. Accordingly, K.S.A. 44-508(d) must be considered in determining the claimant's date of accident and in turn, the timeliness of his notice of that accident.

After considering the entire record, this Board Member finds the ALJ's conclusion that claimant's date of accident was March 15, 2007 should be affirmed. Although the ALJ did not expressly indicate whether he considered March 15, 2007 the date that claimant gave written notice to the employer or the date that claimant's injury was diagnosed as work related, the greater weight of the evidence suggests that March 15, 2007 is, under all the evidence and circumstances, an appropriate accident date. That is the date that the torn rotator cuff was diagnosed. Dr. Vosburgh had earlier noted the connection to work in his first visit on March 8 and in fact, mailed copies of his report to a workers compensation carrier. By March 15, 2007, respondent was made aware of a shoulder injury, the connection to work and claimant's need ultimately for surgery. This Board Member finds the March 15, 2007 accident date should be affirmed. Similarly, claimant's notice of that accident, given that same day by tendering this March 15, 2007 report, should be considered timely under K.S.A. 44-508(d).

Having affirmed the ALJ's conclusion with respect to a March 15, 2007 accident date, the balance of the parties' arguments regarding just cause are moot.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[6] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated May 30, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2007.

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[6] K.S.A. 44-534a.